UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

MV TRANSPORTATION, INC.

and **Case 16-CA-110465**

AMALGAMATED TRANSIT UNION, LOCAL 1091 (ATU LOCAL 1091)

RESPONDENT'S POST HEARING BRIEF

I. JURISDICTIONAL STATUS

MV Transportation, Inc., ("MV" or the "Company") is a corporation engaged in providing transportation services. MV's headquarters are in Dallas, Texas. The Company acknowledges that it meets the Board's jurisdictional standards as an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the National Labor Relations Act ("the Act").

II. INTRODUCTION[1]

The Amended Complaint and Notice of Hearing ("Amended Complaint") alleges that that MV failed to bargain in good faith with the Charging Party, Amalgamated Transit Union, Local 1091 (the "Union") over the maintenance retirement benefits for bargaining unit employees in violation of Sections 8(a)(1) and (5) of the Act. The Amended Complaint also alleges that MV was a "perfectly clear" successor to the Company's predecessor, StarTran, Inc. ("StarTran") or, alternatively, a "*Burns*" successor. The Amended Complaint also alleges that from August 19, 2012 and April 14, 2014, (the Negotiation Period") the Company unlawfully

[1] The record consists of the Reporter's Transcript of Proceedings ["Tr."], Joint Exhibits [Jt. Ex.] Respondent Exhibits ["R. Ex."] and General Counsel Exhibits ["G.C. Ex."].

ceased providing bargaining unit employees with retirement benefits and/or contributions and failed to provide employees with any substitute retirement benefits and/or contributions.

The Company denies all the allegations in the Amended Complaint that it failed to bargain in good faith with the Union regarding the maintenance of retirements and/or the establishment of a retirement plan and/or contributions during the Negotiation Period. As an initial matter, the evidence shows MV was not a "perfectly clear" successor to StarTran and, therefore, did not have to provide the retirement benefits in the StarTran collective bargaining agreement ("CBA") and could set its own initial terms and conditions of employment when it began operations in place of StarTran on August 19, 2012. The bargaining unit employees were specifically notified before being offered employment by MV that their terms and conditions of employment with MV would be different than they were with StarTran—including their retirement benefits. The Union specifically agreed and consented that the retirement benefits in the StarTran CBA would not apply to MV when the Company took over for StarTran.

Since it was not a perfectly clear successor to StarTran, MV could set its own initial terms and conditions of employment for bargaining unit employees who accepted employment with the Company when it began operations—which it did. With respect to retirement benefits, MV notified the Union and employees that it would bargain with the Union to establish a new retirement plan while it continued to bargain with the Union for a new CBA. The evidence shows that MV met all of its bargaining obligations under the Act.

Simply put, the evidence does not support the allegations against the Company and the Amended Complaint, therefore, should be dismissed in its entirety.

III. FACTUAL SUMMARY

MV provides ADA[2] compliant para-transit services to vulnerable customers under contracts with governmental entities across the country. At issue here, is MV's contract with the Capital Metropolitan Transit Authority ("Capital Metro"), the regional area public transit authority, in Austin, Texas. Capital Metro awarded MV a contract to provide para-transit

[2] Americans with Disabilities Act.

services to the citizens of Austin in April 2013. Under the Agreement with Capital Metro, MV provided para-transit services to the citizens of Austin beginning on August 12, 2012.

The previous employer of the bargaining unit employees was StarTran, Inc. ("StarTran"). StarTran was a non-profit corporate agency established by Capital Metro under Texas law to provide transportation services for the transit system managed by Capital Metro. StarTran was established by Capital Metro as a separate entity to continue collective bargaining with the Union; permitting Capital Metro to continue to receive federal funding under the Federal Transit Act. Between 1997 and 2005 StarTran signed a series of collective bargaining agreements with the Amalgamated Transit Union Local 1091 ("Union"). [Jt. Exhs. 1,2,5,7,8,9.] The Union represented a collective bargaining unit made up of all full and part-time mechanics and para-transit drivers employed by StarTran.

Under the initial CBA covering the bargaining unit, employees received pension benefits under "The Austin Transit System Division of American Transit Corporation Retirement Plan (As revised and Restated Effective March 1, 1976)" ("Austin Transit System Plan"). [Jt. Ex. 4; JT Exh. 000004.] Effective March 1, 1989, the Austin Transit System Plan was revised and restated as the "StarTran, Inc., Retirement Plan" ("The StarTran Plan"). [Jt. Ex. 2; JT Exh. 0000012.] The StarTran Plan was incorporated "in its entirety" into the CBAs between StarTran and the Union until 2002.

In 2002, Capital Metro, StarTran, and the Union all agreed to amend and restate the StarTran, Inc. Retirement Plan that covered the bargaining unit employees of StarTran. Under the parties' January 1, 2002, Agreement, the sponsorship of StarTran Retirement Plan was assumed by Capital Metro and was restated as the "Capital Metropolitan Transportation Authority Retirement Plan for Bargaining Unit Employees of StarTran, Inc." (the "Capital Metro Plan"). [Jt. Ex. 6.] Relevant to this case, the 2002 Agreement provided:

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> 3. **Union Approval**. The Union hereby consents to and approves the transfer of sponsorship of the Plan to Capital Metro effective January 1, 2002.

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7. **Collective Bargaining**. By assuming sponsorship of the Plan, Capital Metro will in no way be assuming or attempting to interfere with the collective bargaining relationship between StarTran and the Union. Nothing contained herein shall be construed as diminishing rights under any applicable 13(c) agreements entered into by the parties.

8. **Labor Agreement**. The parties hereby agree to take all necessary and appropriate steps to amend the labor agreement between StarTran, Inc. and the Amalgamated Transit Union Local 1091, July 1, 2000 through June 30, 2005, to reflect the change in Plan sponsorship and the changes agreed to herein including those reflected in Exhibit A.

9. **Employer Contributions**. By assuming the sponsorship of the Plan, **Capital Metro is directly assuming the obligation to make the employer contributions provided in Article 21 of the Labor Agreement**. Notwithstanding anything to the contrary in this Agreement or the Plan, Capital Metro agrees to guarantee the benefits accrued under the Plan. (emphasis added).

10. **Entire Agreement**. This Agreement represents the entire agreement of the parties concerning the sponsorship, amendment and restatement of the Plan and trust and all prior agreements and understanding, whether oral or written, are merged herein.

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12. **Amendment**. This Agreement may be amended in writing signed by all of the parties to this Agreement.

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[J.T. Ex. 6.]

Under the 2002 Agreement, StarTran and the Union subsequently amended their CBA to reflect the changes in the Retirement Plan, including Capital Metro's obligation to make the employer contributions provided in Article 21 of the StarTran CBA. Article 21 [RETIREMENT PLAN] of the later CBAs between StarTran and the Union provided the following regarding pension benefits:

ARTICLE 21- RETIREMENT PLAN

The plan currently in effect, the Capital Metropolitan Transportation Authority Retirement Plan for Bargaining Unit Employees of StarTran, Inc., (effective January 1, 2002) shall remain in effect. This plan, in its entirety, shall be a part of this labor agreement. Information about the Plan is contained in (a) an Agreement signed on September 14, 2002, by the Capital Metropolitan Transportation Authority, StarTran, Inc., and the Union, and (b) the Plan.

A. Purpose

The purpose of the Retirement Plan is to provide, pursuant to the terms of the Labor Agreement between STARTRAN, Inc. and The Amalgamated Transit Union, Local No. 1091, A.F.L.-C.I.O., an equitable retirement plan for all eligible employees of the Employer.

B. Contributions

1. As defined in the. Plan each employee shall be a participant after one (1) year of service. Each participant's weekly contributions shall be calculated as four and three-tenths percent (4-3/10 %) of the Top Operator's Hourly Wage multiplied by forty (40) hours. Equivalent contributions may be calculated on other than a weekly basis. The Employer shall deliver and pay over to the Trustee each month the total amount of all Participant contributions so collected during the preceding calendar month.

   As stated in the Plan each employee who retires under this early, normal, late or disability pension after the effective date of this Labor Agreement, or who separates as a deferred, vested retiree on or after January 1, 2001, and who is eligible for pension payments as provided in the pension plan and Summary Plan Document, shall receive, each month of retirement, an amount equal to sixty dollars ($60.00) multiplied times the number of qualifying years the employee participated in the pension plan all as more fully set forth in the attached amendment to the Star Tran, Inc. Retirement Plan, a copy of which is attached hereto as Attachment III (Example: $60.00 X 25 qualifying years of service = $1500.00 per month)

2. The Employer (as defined in the Plan) shall contribute to the Pension Fund regularly during, or in respect to, each Fiscal Year an amount equal to the aggregate amount contributed by the Members during such Fiscal year. While these funding contributions may be made from time to time at the convenience of the Employer as defined in the Plan it is anticipated that such contributions will be made each month and paid over to the Trustee coincidentally with the delivery

> to the Trustee of Member contributions made through payroll deductions.

Between January 1, 2002 and August 19, 2012, when MV assumed para-transit operations, Capital Metro, not StarTran, was "directly" responsible for making the "Employer" contributions in Article 21 of the StarTran CBA. No evidence was presented at the hearing that the Capital Metro Plan was ever amended to shift the responsibility for making those payments to StarTran—or MV. Paragraph 12 of the January 1, 2002 Agreement required that any changes to the Capital Metro Plan be made in writing and signed by all the parties.

On September 15, 2011, Capital Metro issued a Request for Proposal ("RFP") to solicit proposals from qualified, independent contractors to provide the para-transit operations handled by StarTran. MV responded to the RFP and submitted a detailed proposal by the deadline of November 14, 2011. During negotiations with Capital Metro, MV clarified that it did not intend to provide retirement benefits in the form of a defined pension plan.

During the proposal period, the Union raised issues with Capital Metro regarding a variety of issues, including retirement benefits and whether the new contractor would have to provide pension benefits. In January 2012, Capital Metro, the Sponsor of the Capital Metro Plan, entered into a signed settlement agreement with the Union regarding many issues related to the transfer of para-transit services to a new contractor. [G.C. Ex. 9 (last page).] In exchange for the Union's agreement not to file any objections to Capital Metro's federal funding, Capital Metro agreed to require the new contractor to apply the terms of the StarTran CBA to existing employees for up to a year while negotiating a new labor agreement or until impasse, whichever occurred first. Existing health and welfare and retirement plans, however, were excepted from this obligation. The Union's settlement agreement with Capital Metro provided, in relevant part:

> 1. The new contractor now being selected to replace StarTran is free to negotiate ALL terms and conditions with the core terms as a minimum, but during the negotiation period defined below all terms and conditions of the current CBA apply to existing employees by agreement except as below, until the earlier of:

a. Date certain 8/19/2013; or
b Impasse

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b. Retirement plan

i. CMTA & ATU will negotiate regarding the new contractor's obligations to provide retirement benefits during the negotiation period which will begin no later than 2/1/12.

ii. This arbitration is continued until March 1 and 2. Arbitration will occur on that date if negotiations are not successful. An arbitration award will be issued no later than April 6, 2012.

iii. What retirement benefits will Capital Metro require the contractor to provide until a new CBA is reached or the earlier of the date certain of 8/19/13 or impasse?

Capital Metro and the Union did not reach an agreement regarding what retirement benefits MV (or any other subcontractor) would ultimately have to provide to bargaining unit employees. At the time, Star Tran offered employees both a pension and a supplemental 401(K) plan pursuant to the DBA. Capital Metro and the Union were unable to come to an agreement and the issue of whether Capital Metro had to continue to provide (or require a contractor to provide) pension benefits to bargaining unit employees following the transition of para-transit services to a new contractor went to arbitration under the January 2012 settlement agreement.

In April 2012, the arbitrator ruled that Capital Metro did not have to make any subcontractor make pension payments following the transition of para-transit services. [R. Ex. 4.] The arbitrator noted that bargaining between the Union and the contractor (MV ultimately) should determine the retirement benefits during the negotiation period and thereafter, and that the Union and contractor could negotiate a substitute pension plan with the same benefits as before or bargain for another type of retirement plan.

On April 20, 2012, Capital Metro's President/CEO, Linda S. Watson, issued a letter to StarTran employees, and others, discussing the transfer of para-transit services from StarTran to MV—including pension benefits. [Jt. Ex. 12.] In her letter, Ms. Watson explained how pension benefits would be handled for bargaining unit employees:

> Regarding the pension for bargaining unit employees, earlier this week Capital Metro filed a motion in federal court to confirm the independent ruling received earlier this month. The arbitration ruling stated that Capital Metro is not obligated to require a new contractor to be bound by any terms of the Capital Metro Retirement Plan for Bargaining Unit Employees for StarTran, Inc. The Authority believes that this is the best way to move forward to continue the labor structure transition.
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> [Jt. Ex. 12.]

The Union's Financial Secretary, Lawrence Prosser, (who was then a StarTran employee and participant in the Capital Metro Retirement Plan) received and read Ms. Watson's April 20, 2012, letter. Mr. Prosser testified that he discussed the letter with the Union's then President. Mr. Prosser also testified that neither he nor the Union took any action in response to Ms. Watson's letter. [Tr. Vol. III pp. 260-262.] Mr. Prosser further testified that he understood that MV would not have to provide pension benefits under the Star Trans CBA and that the Union would have to negotiate a new agreement with MV. [Tr. Vol. III. pp. 262-263.] Notably, Mr. Prosser was a Union officer, a signatory to the January 2002 Agreement, and sat on the Capital Metro Plan Board.

On or about April 23, 2012, Capital Metro officially awarded MV a contract to provide para-transit services in Austin. The January 19, 2012, settlement agreement between Capital Metro and the Union was specifically incorporated into MV's contract with Capital Metro—as the Union had negotiated with Capital Metro—as Exhibit 64 to the agreement. [G.C. Ex. 9,10,15,.] Capital Metro confirmed the incorporation of the January 19, 2012, settlement agreement into MV's contract with the Union.

Also included in MV's contract were labor and employment provisions concerning employees represented by the Union. The "Core Terms" document provided:

> (a) **Hiring Rights**
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> (1) Employment of Existing Workforce -- The Contractor shall offer employment to all bargaining unit employees who are represented by Amalgamated Transit Union Local 1091 (ATU Local 1091 or Un-ion) and employed by StarTran, Inc. (the prior employer and operator of certain of Capital Metro's fixed route and paratransit

services) on August 18, 2012. Such employees shall be employed in positions with the Contractor that are comparable to those which they held as StarTran employees.

(2) Conditions on Hiring -- Notwithstanding paragraph (1), the Contractor shall not be required to offer employment to any person otherwise eligible for employment under that paragraph who (A) fails to successfully complete required drug and alcohol testing; (B) fails to successfully complete any physical examination required under the provisions of the collective bargaining agreement with the prior employer; or (C) fails to meet the criminal background check standards of Capital Metro as specified in the Request for Proposals.

(b) **Union Representation** - The Contractor shall recognize ATU Local 1091 as the authorized representative, for purposes of collective bargaining, of its employees who perform work of the type performed by the StarTran bargaining unit represented by ATU Local 1091. The Contractor shall bargain collectively with ATU Local 1091, in accordance with this Section concerning the terms and conditions of employment of such employees.

(c) **Establishment of Initial Terms and Conditions of Employment** — The Contractor shall establish its initial terms and conditions of employment in accordance with the mandatory labor terms and conditions set forth in subsection (e) below. The mandatory terms and conditions in subsection (e) below must be established at the outset of employment and will apply until a collective bargaining agreement is developed with the union or until the earlier of impasse or the date certain of 8/19/2013

(d) **Negotiation of CBA** — The Contractor shall negotiate a collective bargaining agreement with ATU Local 1091 that includes, without limitation, the terms and conditions in subsection (e) below, unless the Contractor and the Union expressly agree to alternative terms. The Contractor shall commence collective bargaining negotiations with ATU Local 1091 as promptly as possible or upon demand from the Union and shall negotiate in good faith with the goal of reaching a collective bargaining agreement with the Union as soon as feasible.

(e) **Mandatory terms and conditions** — The collective bargaining agreement between the Contractor and ATU Local 1091 must contain (at a minimum) all of the terms, conditions, and subjects specified in this subsection, unless the Contractor and the Union expressly agree in writing to alternative terms.

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(3) **Retirement**—The Contractor shall provide a retirement plan for its employees. The Contractor shall bargain collectively with ATU Local 1091 over the terms and conditions of such retirement plan, including the levels or amounts of employee and employer contributions.

On April 24, 2018, MV distributed a packet of information to the StarTran bargaining unit employees regarding the transition to MV, including initial terms of employment with MV. Contained in the information packet was a document titled "**Overview of hiring, pay and benefits issues—transition to MV Transportation**. Bargaining Unit Employees of Star Trans." (emphasis original). Regarding retirement benefits MV specifically notified the bargaining unit employees:

> **Retirement**
>
> - MV will provide a retirement plan for its employees.
> - MV will bargain collectively with ATU local 1091 over the terms and conditions of such retirement plan, including the levels or amounts of employee and employer contributions to the plan.
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> [R. Ex. 12.]

On June 6, 2012, Ms. Watson sent another letter to StarTran employees regarding MV's assumption of the para-transit services. In that letter, Ms. Watson stated in relevant part:

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> Second, an agreement was signed on January 19, 2012 by the ATU, Local 1091 and Capital Metro agreeing that most of the terms and conditions of the current collective bargaining agreement will remain in place for up to a year while the ATU and the contractors are negotiating new agreements. **The terms and conditions related to the retirement plans were not included in that agreement**. (emphasis in the original)
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> Capital Metro believes that the Defined Benefit Pension Plan does not carry over to the new contractors. This was confirmed by an arbitration ruling on April 6, 2012, saying that Capital Metro does not have to require any new contractor to be bound by any terms of the Capital Metropolitan Transportation Authority Retirement Plan for Bargaining Unit Employees of StarTran, Inc. Further, The Labor Agreement that requires the Pension Plan expires on August 18, 2012. Since the Labor Agreement does not carry over to the new contractors, there will be no requirement for employees to continue to earn a pension benefit or for employer contributions to continue.
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> [R. Ex. 7.]

On May 10, 2012, the Union sent a letter to MV requesting to meet and begin bargaining negotiations. [Jt. Ex. 15.] The Company agreed to the earliest date offered by the Union and on June 8,

2012, MV and the Union began face-to-face to discuss initial transition issues and begin negotiations for a new CBA. [Jt. Ex. 20; G.C. Ex. 11.] During their meeting, the parties primarily discussed issues related to the application process for employees interested in transferring to MV. The parties met again in person on July 16 and 17, 2012. During the July 16th meeting with the Union, MV presented a proposed Transition Agreement to cover transition issues. [J.T. Ex. 21.] During the July 27th meeting, MV and the Union discussed retirement benefits for bargaining unit employees. The bargaining notes from the Union representatives state in relevant part:

- "DV[3] --…Cannot administer 401k, Arb[itration] award does not obligate MV to [Defined Benefit] plan."
- "The Health Ins. and [t]he pension plan is being looked at now by their HR Dept. They also said that [MV] have never had a new DB plan."
- Jay[4]—"We are looking for a [defined benefit] plan and a supplemental 401k."

  Dave—"You can present a [defined benefit] plan. But I know it will be an uphill battle. Our [Administration] will be opposed to it."

On July 24, 2012, the Union provided a counter-offer to the Company's July 16th proposal for a transition agreement. [J.T. Ex. 22.] The Union's proposal stated:

TRANSITION AGREEMENT

> The parties agree that all tentative agreements reached between the parties are ratified by the membership of ATU Local 1091 with respect to seniority, health and welfare, retirement, wages, grievances, discipline and accrued leave will be incorporated into the final agreement once reached, unless the parties agree to alternative terms.

On July 25, 2012, the Company and the Union executed a Transition Agreement. [J.T. Ex. 24.] The parties specifically agreed to exclude retirement benefits from the Transition Agreement. [Id.] Over the next several months, the Company and the Union continued their discussions and negotiations

[3] "DV" and "Dave" is Dave Vincent (former) Vice President of Labor Relations for MV.
[4] "Jay" is Jay Wyatt that (former) Union President/Business Agent.

for a new CBA—including exchanging numerous proposals for retirement benefits for bargaining unit employees. [J.T. Exhs. 29-42,]

During a negotiation session on July 13, 2013, the Union claimed, for the first time, that MV had made a "unilateral change" by not continuing "the 4.3% deduction and contribution to a retirement fund." [GC Exh. 21, p. 3.] Brenda Fernandez, Regional Vice President & General Manager (former), responded that she believed that MV was in fact accounting for retirement benefits for bargaining unit employees.

On August 13, 2013, Ms. Fernandez emailed to the Union's International Vice President, Yvette J. Salazar, responding to a list of questions from the Union. One of the Union's questions related to the pension plan in Article 21 of the StarTran CBA and MV's response was as follows:

- **Article 21 Retirement plan**
  - The union question was: Is MV currently withholding 4.3% for the pension plan as stated in the current CBA Article 21?

Response: We have no obligation for the StarTran Pension Plan or any contribution. Article 21 is our proposal.

In April 2014, the Union and MV reached a new collective-bargaining agreement. [Jt. Ex. 52.] Regarding retirement benefits, the parties agreed to provide employees with a 401(k) plan rather than a defined benefit plan.

IV. DISCUSSION

A. Allegations in the Amended Complaint outside the applicable statute of limitations are time barred.

As a threshold issue, the allegations in the Amended Complaint are time barred to the extent that they are beyond the applicable statute of limitations. Section 10(b) of the Act precludes the maintenance of a complaint based upon conduct occurring more than six months prior to the filing of the charge. 29 U.S.C. § 160(b). Congress added the time limitation to discourage dilatory filing of unfair labor practice charges and to "bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused.' " *Local Lodge No. 1424, Int'l Ass'n of Machinists v. NLRB*, 362 U.S. 411, 419, 80 S.Ct. 822, 828, 4 L.Ed.2d 832 (1960); see e.g., *Silver Bakery, Inc.*, 351 F.2d at 39. The 10(b) period does not begin to run until the aggrieved party has received

actual or constructive notice of the conduct that constitutes the alleged unfair labor practice, unless the aggrieved party has failed to exercise "reasonable diligence" which would have discovered the unfair labor practice. See, e.g., *Concourse Nursing Home*, 328 NLRB 692, 693– 694 (1999); *R. G. Burns Electric*, 326 NLRB 440, 441 (1998).

The Union had actual notice of the underlying facts relevant to its unfair labor practice charge and the Amended Complaint by at least July 17, 2012. The evidence shows that on that date, the Union and MV specifically discussed the issue of retirement benefits for bargaining unit employees, including, according to the Union, holding employee pension contributions in an "interest bearing" account. At that time, the Union specifically stated that it wanted MV to provide a defined pension plan and a supplemental 401(k) plan. The evidence shows that MV explicitly told the Union it could not contribute to the StarTran 401(k) and that it was looking at a defined pension plan, but getting such a plan would be an "uphill battle." Additionally, on July 25, 2012, the Union and the Company agreed to a Transition Agreement to address transition issues while the parties reached a new CBA. The parties specifically excluded pension benefits from the Transition Agreement. The Union, therefore, had actual notice that retirement benefits were not in place when MV began operations on August 19, 2012.

The Union also had constructive notice that MV notice that the Company was not withholding employee retirement contributions. First, the Union by entering into the January 2012 settlement agreement with Capital Metro, the Union was aware that MV was not obligated to adhere to the retirement plans in the StarTran CBA. Second, Capital Metro specifically notified employees and the Union in its April 20, 2012, letter that it would not require MV to provide retirement benefits under the StarTran CBA and/or any specific level of retirement benefits. Accordingly, the Union should have been aware when MV began operations that it was not obligated to provide any retirement benefits under the StarTran CBA and/or make any withholdings or contributions to a retirement plan.

Even assuming the Union did not receive actual or constructive notice regarding MV's alleged failure to provide retirement benefits to bargaining unit employees, the Union failed to exercise "reasonable diligence" to discover the unfair labor practice at issue. The Union was plainly aware that Capital Metro would not require MV to provide retirement benefits in place under the StarTran CBA when the Company

began providing services in August 2012. In fact, the Union signed a settlement agreement with Capital Metro that explicitly provided that MV would not have to provide the retirement benefits in the Star Trans CBA. Following an arbitration with Capital Metro on the pension issue, an arbitrator later ruled that Capital Metro did not have to require MV to provide retirement benefits to bargaining unit employees during the "negotiation period." And Capital Metro specifically notified the Union and bargaining unit employees that MV would not be providing retirement benefits under the Capital Metro plan when it began providing para-transit operations, but would instead bargain with the Union regarding new retirement benefits.

Despite all these events, the Union made no effort whatsoever to determine whether MV had set up any retirement plan and/or was making any withholdings from employees for such benefits following the parties July 17, 2012 meeting. The Union's Financial Secretary admitted that the Union requested no documents, information or data from MV regarding a retirement plan and/or whether it was making withholdings from employees for retirement benefits during the negotiation period.

B. MV met all of its bargaining obligations under the Act.

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to refuse to bargain "in good faith with respect to wages, hours, and other terms and conditions of employment." In *NLRB v. Katz*, 369 U.S. 736 (1962) the Supreme Court affirmed the Board's determination that an employer violates Section 8(a)(5) if, when negotiations are sought or are in progress, it unilaterally changes a term or condition of employment without first bargaining to impasse. Moreover, with a few exceptions, contractually established terms and conditions that are mandatory subjects of bargaining must be continued in effect as the status quo after the contract has expired until the parties negotiate a new agreement or bargain to impasse in the negotiations for a collective-bargaining agreement as a whole. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198–199 (1991). The existing terms and conditions continue in effect by operation of the Act; they are no longer contractual terms but terms imposed by law. *Id.* at 206–207 (stating that "the obligation not to make unilateral changes is rooted not in the contract but in preservation of existing terms and conditions of employment") (internal quotation marks omitted).

As an initial matter, the General Counsel's claim that MV was a "perfectly clear successor" to StarTran is without merit. The Board considers a new employer to be a "perfectly clear" successor if it

"either actively, or by tacit inference, misled employees into believing that they would all be retained without change in their wages, hours or conditions of employment, or . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." See *Spruce Up*, 209 NLRB 194 (1974).

In *Nexeo Solutions, Inc.*[5] the Board found that a seller's communications to the union and/or bargaining unit employees can establish notification to the bargaining unit employees about their initial terms and conditions with a new employer. In *Nexeo*, the Board established that "first communications" to employees by either the seller or the employer about changes in their terms and conditions of employment are determinative to whether the successor employer is a "perfectly clear successor."

Here, Capital Metro, specifically notified bargaining unit employees that their terms and conditions of employment with MV, specifically with respect to their retirement benefits, would differ from StarTran. As noted above, Capital Metro notified bargaining unit employees on April 20, 2012, that MV would provide no retirement benefits under the StarTran CBA when it assumed paratransit operations. [Jt. Ex. 12.] On June 6, 2012, Capital Metro once again notified StarTran employees that MV would not be providing retirement benefits as outlined in the StarTran CBA. [R. Ex. 7]

MV confirmed Capital Metro's communications to the StarTran employees that the terms of their employment with MV—including retirement benefits—would not be the same as with StarTran. MV specifically notified bargaining unit employees it would be negotiating a new retirement plan with the Union. Capital Metro's "first communications" to bargaining employees and MV's follow-up communications were clear and unmistakable that MV would not be providing retirement benefits under the Capital Metro Plan.

There is no evidence, and the General Counsel does not allege, that either Capital Metro or MV mislead employees to believe that they would be retained by MV with no changes in their terms and conditions of employment—including retirement benefits. The Union's Financial Secretary (who was a member of the bargaining unit and a participant in the Capital Metro Plan) testified that after he received the April 20, 2012, letter from Capital Metro he understood that MV would not have to provide pension

[5] 364 NLRB No. 44 (July 18, 2016).

benefits under the StarTran CBA and that the Union would have to negotiate a new CBA with MV. [Tr. Vol. III. pp. 262-263.] Since MV was not a *perfectly clear* successor to StarTran it was free to set its own initial terms and conditions of employment.

Regardless of whether MV was a *perfectly clear* or ordinary *Burns* successor to StarTran, MV did not violate the Act as alleged by the General Counsel, or in any other way. The General Counsel's claim that "from August 19, 2012 and April 14, 2014, the Company unlawfully ceased providing bargaining unit employees with retirement benefits and/or contributions and failed to provide employees with any substitute retirement benefits and/or contributions" is without merit.

MV did not unilaterally cease contributing to the retirement plans in the StarTran CBA. The Union and Capital Metro explicitly agreed that the retirement plans in the StarTran CBA would not apply to MV when it assumed operations of the para-transit services. The January 2012 settlement agreement between the Union and Capital Metro was part of MV's service contract and MV agreed to be bound by the terms of that agreement. Additionally, MV agreed in its service contract with Capital Metro to bargain collectively with the Union to implement a new retirement plan while the parties negotiated a new CBA. The undisputed evidence shows that met its bargaining obligations with the Union. Finally, the General Counsel, the Union, and the Company all agreed at the hearing, that MV could not make any contributions to the Capital Metro Plan.

Simply put, the *status quo* at the time that MV began operations on August 2012, did not include any obligation that required MV to continue the retirement benefits under the StarTran CBA and/or provide any specific type of retirement benefit. Instead, MV's obligation was to collectively bargain a new retirement plan with the Union. The evidence plainly shows that MV satisfied its bargaining obligations in that regard. The fact that MV and the Union were unable to agree to a new retirement plan until well after MV began its operations is not a violation of the Act. Indeed, MV would have violated the Act if, without the Union's agreement, it would have unilaterally implemented retirement benefits while bargaining a new contract with the Union.

Additionally, there is no merit to General Counsel's claim that MV had an obligation to set aside retirement contributions during the negotiation period and bargain with the Union over how those monies

would be distributed. The General Counsel will likely rely on the Board's decision in *Cofire Paving* 359 NLRB 180 (2012) to support its theory.[6] There, the Board concluded the Respondent violated the Act when it failed to set aside employer contributions to the Union's pension fund following the expiration of the collective bargaining agreement. The Board held that the Respondent retained the contributions for its own benefit, thereby "enriching itself at the expense of the employees" and, therefore, the Respondent failed to meet its statutory bargaining obligation.

Unlike *Cofire Paving*, this case does not involve employer contributions to a pension fund. The terms of the Capital Metro Plan plainly and explicitly provides that Capital Metro was responsible for making the employer pension contributions contained in Article 21 of the StarTran CBA, not MV. Thus, even applying *Co-Fire Paving*, to the facts of this case, MV had no obligation to calculate and set aside any employer pension contributions under the StarTran CBA. Additionally, *Co-Fire Paving* did not find that an employer has an obligation to deduct and hold employee retirement contributions. Nor would such a result be reasonable. Unlike the situation in *Co-Fire Paving*, the employees here did not suffer any material loss because they retained their own money. MV did not "enrich" itself at the expense of employees because it did not take and/or keep any of the employees' contributions. To the contrary, the evidence shows that MV accounted for retirement contributions during the time it was in negotiations with the Union for new pension benefits. Accordingly, the Company met its bargaining obligations in this case.

V. CONCLUSION

For the foregoing reasons (and based upon all the evidence and testimony presented at the hearing), the General Counsel failed to prove that any of the allegations in the Amended Complaint by a preponderance of the evidence. Accordingly, the Amended Complaint should be dismissed in its entirety.

[6] *Cofire* was invalidated by N.L.R.B. v. Noel Canning 134 S. Ct. 2550 (2014). Any argument by the General Counsel to revive *Cofire* should be rejected.

Dated this 19th day of December 2018.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed and served on this 19th day of December 2018, as follows:

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